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May 5, 2010

FILED ELECTRONICALLY

Office of Regulations and Interpretations
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Avenue, NW, Room N-5655
Washington, DC 20210

Re: RIN 1210-AB35: 2010 Investment Advice Proposed Rule

Dear Sir or Madam:

We are writing on behalf of the Committee of Annuity Insurers (the "Committee") to comment on the proposed investment advice regulations published by the Department of Labor (the "Department") in the Federal Register on March 2, 2010. The Committee is a coalition of life insurance companies formed in 1982 to participate in the development of federal policy with respect to annuities. The Committee's current 31 member companies represent more than 80% of the annuity business in the United States and are among the largest issuers of annuity contracts in connection with employer-sponsored retirement plans and individual retirement arrangements ("IRAs"). A list of the Committee's member companies is attached.

The Committee very much appreciates the Department's careful consideration of the many difficult issues in the proposed regulations implementing the statutory prohibited transaction exemption created by the Pension Protection Act ("PPA") for participant-level investment advice. The sole issue addressed in this letter is the extent to which a computer model relying on the PPA exemption must take into account deferred annuity investment options. As discussed below, the Committee urges the Department to modify the regulation to provide that such annuity investment options must be taken into account.

Section 408(g)(3) of the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended by the PPA, provides that a computer model satisfies the PPA prohibited transaction exemption only if it "takes into account all investment options under the plan in specifying how a participant's account balance should be invested." Nonetheless, the proposed regulations provide that a computer model may disregard (i) a brokerage window, (ii) a company stock fund, (iii) a single fund solution such as a target date fund, and (iv) "an annuity option with respect to

which a participant or beneficiary may allocate assets toward the purchase of a stream of retirement income payments guaranteed by an insurance company.”¹ For the latter two classes of investment options, the proposed regulations provide that the participant or beneficiary must be furnished with a general description of the excluded option contemporaneous with the investment advice.

As reflected above, the statute flatly provides that all investment options must be taken into account by a computer model. Given the plain language of the statute, it is clear that the regulations should reflect a strong bias toward including all options and, in the absence of a compelling public policy rationale to the contrary, we believe that annuities should be taken into account. We greatly appreciate that there are strong public policy rationales for the exclusions for company stock funds, single fund solutions, and brokerage windows that justify a departure from the statutory language.² However, there is no policy rationale for the exclusion of annuities. To the contrary, encouraging participants to elect to receive a portion of their retirement savings in the form of a lifetime income option such as an annuity is an important policy goal, as recently articulated by the Department’s request for information regarding lifetime income options published on February 2, 2010.³

With respect to public policy, life-contingent distributions from an annuity are the only sure means of insuring against the risk of outliving one’s savings, and annuities offered as dual investment and distribution options are one of the most promising avenues for enhancing the extent to which participants elect annuity payouts. There are many different approaches ranging from traditional deferred annuity contracts to newer hybrid products. For example, an annuity investment option may allow a participant to purchase a guaranteed lifetime withdrawal benefit (“GLWB”) that permits a participant to withdraw a specified portion of a notional account balance for life, regardless of the contract’s cash value. GLWBs provide both protection against adverse investment experience as well as a contingent guaranteed life annuity. Another option is to invest during the accumulation phase in a deferred fixed annuity contract that allows participants to purchase a lifetime income stream while locking in current interest rates and mortality tables. These options allow participants to take advantage of cost averaging through payroll deduction contributions and, thereby, mitigate the risk of retirement during a low interest rate environment when annuity purchase rates may be less favorable.

¹ See Prop. DOL Reg. §§ 2550.408g-1(b)(4)(i)(F)(2), 2550.408g-1(c)(1).

² For example, as permitted by ERISA, some plans require investments in company stock, and these required investments may be fundamentally inconsistent with the underlying investment principles that guide the computer model. Similarly, many computer models provide advice on a variety of investment issues that would also be covered by a single fund solution, such as asset allocation, glide path, and capital markets assumptions. Finally, brokerage windows enable participants and beneficiaries to select investments beyond those designated by the plan, which does not correlate with the purpose of an advice computer model to provide advice with respect to options available under the plan.

³ Request for Information Regarding Lifetime Income Options for Participants and Beneficiaries in Retirement Plans, 75 Fed. Reg. 5,253, 5,253 (Feb. 2, 2010) (noting that the Department of Labor and the Department of the Treasury “are currently reviewing the rules under . . . ERISA . . . to determine whether, and, if so, how, the Agencies could or should enhance, by regulation or otherwise, the retirement security of participants in employer-sponsored retirement plans and in individual retirement arrangements (IRAs) by facilitating access to, and use of, lifetime income or other arrangements designed to provide a lifetime stream of income after retirement”).

Despite the strong public policy in favor of promoting annuities as dual investment and distribution options, the regulations appear to permit their exclusion from advice computer models. This could mean that deferred annuities offered as part of a participant-directed plan's investment menu will rarely be recommended as investments and, therefore, that the prospects of such annuities being used as sources of lifetime income will be greatly reduced. Given the potential of the proposed regulations to decrease the frequency of recommendation of deferred annuities as investments, the net effect may be decreased financial security in retirement.

The Department's reasoning for permitting the exclusion of deferred annuity contracts from advice computer models is not clear. One justification may be found in the preamble to the prior final regulations, published on January 21, 2009, which states generally that where a participant has allocated assets to an immediate annuity, modeling should not be required.⁴ However, the proposed rule is much broader than the reasoning given in the preamble to the prior final regulations, as it appears to permit the exclusion of deferred annuities as well. It even appears to permit a computer model to disregard investment funds offered through an insurance company separate account solely because such an investment is technically in "an annuity option with respect to which a participant or beneficiary may allocate assets toward the purchase of a stream of retirement income payments guaranteed by an insurance company."⁵

Another possible justification for the exception of deferred annuities may be that there are many layers to an annuity investment that a typical plan offering will not have, such as taking into account longevity risk or guaranteed lifetime income, which may be difficult for a computer model to address. However, mere difficulty in adjusting to the statutory requirements is not a valid reason for eschewing good public policy. The Committee is not aware of any reason or technological barrier that would inherently preclude inclusion of deferred annuities in computer models, and we believe that, given adequate time for transition and adjustment, all computer models that wish to take advantage of the statutory prohibited transaction exemption may be modified to include annuities. Thus, the Committee strongly believes that advice provided pursuant to one of the computer model approaches should take into account available annuities, particularly deferred annuities, and a transition period could be provided to assist in enabling computer models to adapt to the requirements.

The Committee also notes that there are other investment advice arrangements sanctioned by the Department that involve computer models. In particular, one computer-based approach relies on the use of a computer model that is developed by a qualified independent third party (the "SunAmerica Opinion").⁶ The SunAmerica Opinion does not appear to require that a computer model based thereon take into account all of the plan's investment options. Nonetheless, we urge the Department to consider whether there are ways to encourage models based on the SunAmerica Opinion to take into account annuity investment options, for example,

⁴ Investment Advice – Participants and Beneficiaries, 74 Fed. Reg. 3,822, 3,827 (Jan. 21, 2009) (withdrawn Nov. 20, 2009).

⁵ *Id.*

⁶ ERISA Advisory Op. 2001-09A (Dec. 14, 2001).

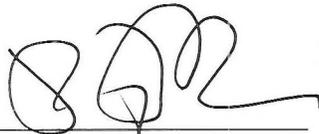
May 5, 2010

by stating that one factor a plan fiduciary should consider in selecting and monitoring a computer model is whether the model takes into account annuity investment options.

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Should any questions arise in connection with our comments, or if the Committee can be of any assistance to the Department in its consideration of this important issue, please contact Jason Bortz or Joseph McKeever, both of Davis & Harman LLP. They can be reached by phone at 202-347-2230, or *via* electronic mail at jbortz@davis-harman.com or jfmckeever@davis-harman.com, respectively.

Sincerely,



Jason K. Bortz



Joseph F. McKeever, III

Attachment

The Committee of Annuity Insurers

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AEGON Group of Companies, Cedar Rapids, IA
AIG American General, Wilmington, DE
Allstate Financial, Northbrook, IL
AmerUs Annuity Group Co., Topeka, KS
AXA Equitable Life Insurance Company, New York, NY
Commonwealth Annuity and Life Insurance Co.
(a Goldman Sachs Company), Southborough, MA
Conseco, Inc., Carmel, IN
Fidelity Investments Life Insurance Company, Boston, MA
Genworth Financial, Richmond, VA
Great American Life Insurance Co., Cincinnati, OH
Guardian Insurance & Annuity Co., Inc, New York, NY
Hartford Life Insurance Company, Hartford, CT
ING North America Insurance Corporation, Atlanta, GA
Jackson National Life Insurance Company, Lansing, MI
John Hancock Life Insurance Company, Boston, MA
Life Insurance Company of the Southwest, Dallas, TX
Lincoln Financial Group, Fort Wayne, IN
MassMutual Financial Group, Springfield, Massachusetts
Metropolitan Life Insurance Company, New York, NY
Nationwide Life Insurance Companies, Columbus, OH
New York Life Insurance Company, New York, NY
Northwestern Mutual Life Insurance Company, Milwaukee, WI
Ohio National Financial Services, Cincinnati, OH
Pacific Life Insurance Company, Newport Beach, CA
Protective Life Insurance Company, Birmingham, AL
Prudential Insurance Company of America, Newark, NJ
RiverSource Life Insurance Company (an
Ameriprise Financial Company), Minneapolis, MN
Sun Life of Canada, Wellesley Hills, MA
Symetra Financial, Bellevue, WA
TIAA-CREF, New York, NY
USAA Life Insurance Company, San Antonio, TX

The Committee of Annuity Insurers was formed in 1982 to participate in the development of federal tax and securities law policies with respect to annuities. The member companies of the Committee represent more than 80% of the annuity business in the United States.

May 5, 2010